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No. 77-1614

In the Supreme Court of the United States

OCTOBER TERM, 1977

OTIS R. BOWEN, AS GOVERNOR OF INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, officials of the State of Indiana and a state agency, seek review of an order of the court of appeals remanding this case to the district court for further proceedings. Contrary to petitioners' contention, the action of the court of appeals is consistent with this Court's previous order and raises no question warranting consideration by this Court.

1. The history of this protracted litigation is set out in some detail in *United States* v. *Board of School Commissioners of Indianapolis, Indiana*, 541 F. 2d 1211, 1212-1215 (C.A. 7) (Pet. App. A-32 to A-38). In that decision, the court of appeals upheld the district court's order requiring the adoption of an interdistrict desegregation plan. Under that plan, black students from the Indianapolis system would be assigned and transported to predominantly white schools located in suburban districts.

On January 25, 1977, this Court granted a writ of certiorari from that order and, without opinion, vacated the judgment and remanded the case "for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.* [429 U.S. 252] and *Washington* v. *Davis*, 426 U.S. 229 (1976)" (429 U.S. at 1068-1069).

On remand, the court of appeals further remanded the case for the district court to reconsider its judgment in accordance with this Court's directive (Pet. App. A-1 to A-30). The court noted that the district court had previously found that actions taken by state and local officials had increased segregation in the Indianapolis area schools but that the district court had not explicitly determined whether those actions had been taken with a discriminatory intent (Pet. App. A-6 to A-18). The court also directed that in the event the district court found a constitutional violation under the standard prescribed by this Court, the court should apply the principles of *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, in formulating an appropriate remedy (Pet. App. A-26).

Following the order of the court of appeals of which petitioners seek review, there have been further proceedings in the case in both the district court and the court of appeals. On April 7, 1978, the district court refused to permit the Indianapolis school system voluntarily to adopt a broad intradistrict desegregation plan until consideration of interdistrict desegregation was completed. On May 17, 1978, the court of appeals vacated that decision and remanded the case to the district court with directions to approve the intradistrict plan pending final determination of the interdistrict issue unless doing so would "produce injustice," or unless the district court found the plan to be "unsound." On June 2, 1978, the district court again refused to permit the implementation

of the intradistrict plan and ordered the Indianapolis Public School District to prepare an interdistrict plan.

2. The ruling of the court of appeals challenged here was not a final order; the court merely remanded the case for further legal and factual findings by the district court in accordance with the order remanding the case from this Court. There are no extraordinary circumstances here warranting review of this nonfinal order of the court of appeals. The order is therefore not ripe for review by this Court. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258; *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 378, 384.

On the merits, petitioners contend that the court of appeals erred by not summarily disposing of the case on remand from this Court. In their view, the court of appeals should have ruled that the district court could not possibly find a constitutional violation under the standard prescribed by this Court, even though the district court had not previously had occasion to apply that standard to the facts of the case.

In declining to follow that course but determining instead to give the district court an opportunity to apply the proper legal standard to the facts of the case, the court of appeals did not err. Since this Court directed reconsideration of the record in light of intervening decisions, it was entirely appropriate to allow the court most familiar with the record and with the case in general to make the initial decision concerning the alleged constitutional violation. See *Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. at 419; *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 299. Contrary to petitioners' assertions (Pet. 18), nothing in this Court's order of January 25, 1977, precludes a remand to the district court.

Petitioners suggest that the court of appeals' order of February 14, 1978, will necessarily cause further delay in desegregation within the boundaries of the Indianapolis system. To the contrary, the court was careful to note that the immediate implementation of intradistrict remedies would be "wholly appropriate" (Pet. App. A5). Moreover, in its May 17 order, the court of appeals directed the district court to permit the immediate adoption of the School District's intradistrict plan unless it specifically found that implementation of that plan would be improper. Whether an intradistrict remedy will be implemented immediately is unclear, in light of the district court's order of June 2, but that question remains to be resolved in further proceedings in the district court and the court of appeals; it clearly was not foreclosed by the order challenged here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

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